



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D C 20463

**October 2, 1997**

**Vincent F Heuser, Jr**  
**P O Box 33034**  
**Louisville, KY 40232-3034**

**RE MUR 4012**  
**Freedom's Heritage Forum and**  
**Frank G Simon, M D , as treasurer**

**Dear Mr Heuser**

As you were previously notified, based on the complaint and information supplied by your clients, on July 18, 1995 and October 29, 1996, the Commission found that there was reason to believe that the Freedom's Heritage Forum ("Forum") and Frank G Simon, M D , as treasurer, violated 2 U S C §§ 434(b), 434(c), 441a(a)(1)(A), and 441d(a)(3) and instituted an investigation of this matter

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that your clients knowingly and willfully violated 2 U S C §§ 441a(a)(1)(A), 434(b), 441d(a), or, in the alternative, violated 2 U S C §434(c)

The Commission may or may not approve the General Counsel's recommendations Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible ) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe violations have occurred

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days

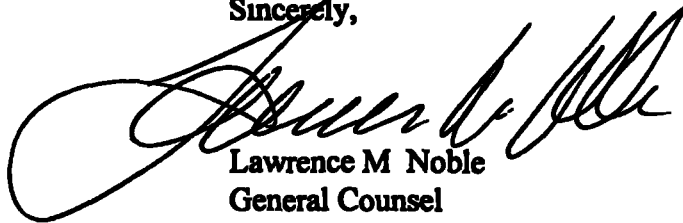
*Celebrating the Commission's 20th Anniversary*

**YESTERDAY TODAY AND TOMORROW**  
**DEDICATED TO KEEPING THE PUBLIC INFORMED**

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement

Should you have any questions, please contact Dominique Dillenseger, the attorney assigned to this matter, at (202) 219-3690

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence M. Noble", written over the typed name and title.

Lawrence M Noble  
General Counsel

Enclosure  
Brief

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**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of	)	
	)	
Freedom's Heritage Forum and	)	MUR 4012
Frank G Simon, M.D , as Treasurer	)	

**GENERAL COUNSEL'S BRIEF**

**I. STATEMENT OF THE CASE**

This matter was initiated by a complaint and a supplemental complaint submitted by Maureen Keenan. The complaint alleged that Frank G Simon, M D , the Freedom's Heritage Forum ("Forum") and Arthur Cerminara, as treasurer, reported certain expenditures as independent when, in fact, the expenditures qualified as contributions because of coordination between the Forum and the Hardy for Congress Committee ("Hardy Committee") and the Forum and the Lewis for Congress Committee ("Lewis Committee"). The complaint also alleged disclaimer and reporting violations by the Forum regarding expenditures for certain tabloids prepared and distributed by the Forum in support of the Hardy and Lewis campaigns. Based upon the information presented, the Commission found reason to believe that the Forum and Frank Simon, as treasurer, violated 2 U S C §§ 434(b), 434(c), 441a(a)(1)(A), and 441d(a)(3) and conducted an investigation.

**II. FACTUAL AND LEGAL ANALYSIS**

**A. COORDINATION ISSUE**

**1. Applicable Law**

The Federal Election Campaign Act of 1971, as amended (the "Act") limits the amount that persons other than multicandidate committees may contribute to any candidate for federal office to \$1,000 per election. 2 U S C § 441a(a)(1)(A). A "contribution" includes "any gift, subscription, loan, advance or deposit of money or anything of value made by any person for

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the purpose of influencing any election for Federal office " 2 U S C § 431(8)(A). Independent expenditures are not limited by the Act See Buckley v. Valeo, 424 U S 1, 39 (1976) The Act defines an "independent expenditure" as one made "by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate," or the candidate's authorized committee or agent, and "which is not made in concert with, or at the request or suggestion of" any candidate or candidate's agent. 2 U S C § 431(17)

The Commission's regulations define "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate" to mean any "arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication " 11 C F R

§ 109 1(b)(4)(i) There is a presumption that expenditures are coordinated if they are made when based on information about the candidate's "plans, projects, or needs" provided to the expending person by the candidate, or by the candidate's agent(s), with a view toward having an expenditure made 11 C F R § 109 1(b)(4)(i)(A) An expenditure which does not qualify under 11 C F R § 109 1 as an "independent expenditure shall be a contribution in-kind to the candidate and an expenditure by the candidate, unless otherwise exempted " 11 C F R § 109 1(c)

On a number of occasions, the Commission has considered the nature and purposes of an event sponsored by a group and involving the active participation of a candidate for Federal office to determine if the event results in a contribution or expenditure on behalf of the candidate The Commission has found that a contribution or expenditure would result if the event involves

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(1) the solicitation, making or acceptance of contributions to the candidate's campaign, or (2) communications expressly advocating the nomination, election or defeat of any candidate AO 1996-11; AO 1992-5; AO 1988-22 In Advisory Opinion 1988-22, the Commission stated that the active participation by candidates for Federal office as featured speakers at luncheons sponsored by an organization would involve coordination with the candidate in the providing to and receipt of a benefit for the candidate

Coordinated expenditures result in several reporting obligations by the donor when it is a reporting entity The donor must disclose the expenditure as a contribution, the date and amount of such contribution and, in the case of a contribution to an authorized committee, the candidate's name and office sought 2 U S C § 434(b)(4)(H), 11 C F R § 104.3(b)(3)(v)

The Act addresses violations of law that are knowing and willful See 2 U S C § 437g(a)(5)(b) The knowing and willful standard requires knowledge that one is violating the law Federal Election Commission v. John A. Damesi for Congress Committee, 640 F Supp 985 (D N J 1986) A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge that the representation was false " United States v. Hopkins, 916 F 2d 207, 214 (5th Cir 1990) An inference of a knowing and willful violation may be drawn "from the defendants' elaborate scheme for disguising" their actions Id at 214-15

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## **2. Facts and Analysis**

### **Timothy Hardy**

Dr. Frank G Simon, an allergist, is the founder, president and sole officer of the Freedom's Heritage Forum located in Louisville, Kentucky The Forum, an organization promoting pro-life and other issues, had been in existence for ten to fifteen years as a state PAC before becoming a federal PAC on March 3, 1994 Dr Simon runs the Forum from his home or office, directs Forum volunteers, and controls Forum finances He is the only individual authorized to sign checks and make disbursements on behalf of the Forum and has been performing the underlying duties of treasurer for the Forum

The investigation revealed that Dr Simon played an important role in recruiting Timothy Hardy to run in the 1994 Republican primary Dr Simon was clearly interested in finding a pro-life candidate to oppose Susan Stokes in the primary It was Corley Everett, a Forum volunteer and longtime acquaintance of Dr Simon, who called Timothy Hardy to persuade him to consider running in the 1994 primary

In November 1993, Timothy Hardy, who had made an unsuccessful bid for federal office in 1990 for Kentucky's 3rd District, was contacted by Stu Reikert, head of the Search Committee for the Jefferson County Republican Executive Committee about running for the 37th Legislative District ("LD") state representative position, a party position Members of this Search Committee also included Paul Cochran and Corley Everett Hardy testified that he was interested in the 37th LD position but that he was concerned that Congresswoman Susan Stokes, the Republican pro-choice candidate, would run unopposed in Kentucky's 3d District 1994 primary race Hardy testified that he spoke about his concerns to Reikert and to several

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individuals from pro-life organizations and supporters of the pro-life issue, including Donna Shedd, Margie Montgomery, and Ken Geisler

In late December 1993, Corley Everett telephoned Hardy several times to ask him to consider running in the congressional race instead of the 37th LD. Shortly thereafter, on or about January 4, 1994, before Hardy had declared his candidacy for the 1994 Republican primary, a small group of four or five individuals involved in the pro-life issue (including Donna Shedd, Corley Everett and Dr. Simon) attended a private evening meeting at "Shoney's" restaurant. According to Dr. Simon, the purpose of the meeting was to hear Tim Hardy speak about his plans to run in the primary. Dr. Simon testified that he attended the meeting because he wanted to meet Hardy and to find out whether Hardy would run and how he stood on issues. Dr. Simon testified that this was the first time he had actually met Hardy though he knew of Hardy's pro-life stance and thought the Forum had probably endorsed Hardy in his 1990 primary race. Dr. Simon further testified that the meeting was in the form of a question and answer session and that Hardy answered questions about his background, reasons for wanting to run, including his pro-life stance and challenge of Stokes, and that Hardy discussed hurdles he would face if he decided to run -- family, job, and finances.

This information provided at the meeting conveyed to Dr. Simon that Hardy was serious about running, that Hardy's views were compatible with the Forum's and worthy of support, and that Hardy would need assistance with his campaign. In short, at this meeting, Hardy himself communicated to Dr. Simon his plans, projects, and needs with obviously an expectation of some type of support.

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On January 5, 1994, Hardy rented office space from Eline Realty, operated by Corley Everett's godparents. This office, located on 4140 Shelbyville Road, at the corner of Shelbyville and Browns Lane in Louisville, is approximately 1.6 miles from (a 5-minute drive) and on a direct route to Dr. Simon's office at 1404 Browns Lane. The next day, on January 6, 1994, even before Hardy had declared his candidacy and set up a committee, Dr. Simon presented the Hardy campaign with its first contribution, a \$500 cashier's check. Dr. Simon initially testified that he did not remember making any contributions to the Hardy campaign or how this contribution came to be made, but later acknowledged that he was aware that Everett was working on Hardy's campaign and that Everett may have called him about making this contribution. For his part, Hardy testified that he did not know if he received any contributions from the Forum or Dr. Simon because Everett took care of these matters. Hardy Committee bank records, however, reflect that Hardy himself used Dr. Simon's \$500 contribution as an initial deposit to open the Hardy Committee's checking account on January 6, 1994. The following day, on January 7, 1994, both Hardy and Everett signed signature cards for the Hardy Committee account.

Hardy Committee records reflect that Hardy appointed a CPA named Bob Ross as campaign treasurer on January 10, 1994. Corley Everett testified that he did not know who Ross was, did not know how Hardy became acquainted with Ross, was not involved in selecting Ross as treasurer, and was in fact informed by Hardy that Ross would be treasurer. Hardy, on the other hand, testified that he did not know Ross and that Everett first came up with Ross's name as a treasurer. Ross testified that at the time he became treasurer for Hardy he knew Dr. Simon and that he later did some volunteer work (preparing Forum reports) for Dr. Simon and the Forum during the 1994 election. Ross further testified that he did not remember who referred

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him to Hardy but that this could have been Dr Simon because Simon was the only person he could think that might have referred him to Hardy Dr Simon testified that he recalls someone, perhaps Corley Everett, telling him that Hardy needed a treasurer, and that he may have talked to Ross in January 1994 (after the meeting at Shoney's Restaurant) to ask him to serve as treasurer for Hardy Thus, it appears that neither Hardy nor Everett knew Ross before the campaign and that Dr Simon was responsible for lining up Ross, an accountant, to serve uncompensated as the Hardy campaign's treasurer.

Around January 8, 1994, Ross met with Hardy, agreed to become his treasurer and signed a signature card on the campaign checking account Ross worked as treasurer for the Hardy Committee from about January 8, 1994, through November 2, 1994 Ross prepared the Hardy committee reports at his office from bank statements provided by Corley Everett

On or about January 12, 1994, Hardy declared his candidacy and filed his application as a 1994 Republican primary candidate with the Kentucky Election Registry Shortly thereafter, he formally hired Everett as his campaign manager and Everett began gathering volunteers for Hardy's campaign Some of the volunteers were individuals who had also volunteered for the Forum such as Ed Parker and Boyd Pendleton Richard Lewis was also a volunteer and worked as the "issues" person Everett became a paid employee of the Hardy for Congress campaign the last couple of months before the primary Thus, within several weeks after Hardy had received initial calls from Everett and met Dr Simon, Hardy had secured office space, begun receiving campaign contributions, opened a bank account, and filed for candidacy

Hardy testified that he received a candidate survey (questionnaire) from the Forum which he completed and returned Hardy claims, however, that at the time he received and completed

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the questionnaire neither he nor anyone else on his staff knew what the Forum was Hardy also testified that among the questionnaires received, the Forum questionnaire was the only one to include a formal request for a photo Hardy testified that he included a black and white (per the request) family photo with the questionnaire Dr Simon, on the other hand, testified that Forum questionnaires do not include requests for photos, though he did not deny having a photo and that it may have come from the Hardy campaign and could not explain how the Forum obtained it This discrepancy in the testimony suggest that neither Hardy nor Dr Simon wanted to admit that they obtained the photo through coordination

On February 10, 1994, Dr Simon made an additional \$400 00 contribution, also by cashier's check, to the Hardy Committee Dr Simon testified that this contribution, like the earlier one he made to Hardy, may have been passed on to Corley Everett Hardy Committee records reveal that during the period January 6 through February 10, 1994, the Hardy Committee received a total of five contributions totaling \$1,155, of which \$900 came from Dr Simon's two contributions

The investigation clearly shows that Dr Simon was responsible for starting up Hardy's candidacy by providing early direct financial support and volunteers to the Hardy campaign Shortly after the meeting at the restaurant and even before Hardy had declared his candidacy, Dr Simon made the first contribution to Hardy's campaign which was probably given to Everett and which, in fact, Hardy used to open the Hardy Committee campaign bank account Dr Simon was also responsible for lining up Hardy with an accountant to serve uncompensated as treasurer Moreover, Everett, who obviously remained in contact with Dr Simon, became Hardy's

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campaign manager and the Hardy campaign included several volunteers who were or had also been volunteers for the Forum

In the few weeks leading up to the primary, the Forum organized a strategy-planning event for Hardy, prepared and distributed various pro-Hardy flyers, and organized phone banks that advocated the election of Timothy Hardy

The evidence revealed that on April 19, 1994, at a crucial time in the campaign, with the primary less than a month and a half away, Dr Simon and the Forum organized and hosted an event focused on planning strategy for electing Hardy. In fact, all of the Forum's reported expenditures on behalf of the Hardy campaign were made after this event.

The event was held at a Louisville rental facility called "Swiss Hall." A copy of an invitation to the event, shows a signature of Dr Simon and describes the event as an "appreciation banquet" for precinct coordinators, with Tim Hardy as the speaker, and where "We will plan strategy on how to get Tim Hardy elected." The printed program for the evening states that there would be a speech by "Tim Hardy, Candidate for Republican Nomination to Third District Congressional Seat", and includes a "Sign up Sheet" for attendees to volunteer or make a contribution to the Forum. Approximately 200 people attended the event. Each attendee was provided with a tag reflecting name and precinct and directed to sit at tables by precinct. On an audiotape of the event, Dr Simon is heard introducing Hardy, followed by Hardy's speech about his position on pro-life and other issues and Hardy's request for support in getting elected. Immediately after Hardy's speech, Dr Simon is heard telling the audience "to move quickly to the offensive challenge" so as "to get Hardy elected as the next Congressman from Louisville," and asking people to divide into legislative precincts and that he will "explain what you can do to

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get Tim Hardy elected " Dr Simon is further heard asking for volunteers to make telephone calls urging people in their respective precincts to vote for Hardy in the primary. Dr. Simon explained that he would first do a mailing of Hardy literature and then send phone scripts to volunteers for making follow-up calls to Republican voters to ask them if they received the Hardy mailing and to urge them to vote for Hardy This Office subsequently obtained from Dr Simon a copy of the letter and phone script which was sent to the volunteers The letter, dated May 12, 1994, some three weeks later, refers to an enclosed Hardy tabloid which was sent to Republican voters and includes phone scripts for first and second calls urging support for Hardy

After the event, the volunteers made calls and mailed or distributed a series of pro-Hardy flyers including tabloids, letters, and sample ballots Dr Simon testified that he estimated that about 50 volunteers made calls

The testimony of the deponents who spoke about the event contain several important discrepancies

Corley Everett testified that he and Hardy attended a "meet-the-candidate" dinner event hosted by the Forum Everett further testified that several other candidates were also present but that Hardy was the only federal candidate, and that all the candidates gave prepared speeches

Dr Simon testified that several candidates attended the event, that volunteers were organized by districts and precincts, and that at the end of the evening he passed out phone lists for volunteers to make phone calls on behalf of the Forum and on Forum issues Dr Simon testified that he did not specifically endorse Hardy by name at the event but conceded that he endorsed the pro-life candidate who was Hardy Dr Simon also testified that (1) that Hardy spoke about his position on the issues during his presentation to the audience, and, (2) that

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volunteers were also told to make calls for promoting Hardy's candidacy Dr Simon also testified that he was not sure whether Hardy was still at the event when Simon instructed volunteers about the phone calls.

Hardy testified that he was invited to a "spaghetti dinner" and that he was not sure what the purpose for the event was except to mingle around Second, Hardy testified unequivocally that the invitation to the event specified that "no speeches" or "no stumping" would be allowed and that he in fact made no speeches Hardy explained that there were three other candidates beside himself at the event, that all the candidates were seated at the same table and that Simon introduced each candidate, who in turn introduced themselves and their family Third, Hardy testified that the event was set up to get out the vote for the state and legislative district level races only Hardy explained that after the candidate introductions, Dr Simon got up and spoke about the importance of getting out the votes, and encouraged people to volunteer to walk door to door, hand out flyers, and make phone calls Hardy testified that he stayed after Dr Simon's remarks and "walked around" but then left after awhile because the volunteers were busy organizing and did not have the time to talk Finally, Hardy testified that he had not met, spoken with, and "didn't really know who [Simon] was," until he attended the event

Though both Hardy, and to a lesser extent Simon, tried to portray the event at "Swiss Hall" as a candidate night whose focus was not primarily Hardy, the information obtained in the investigation contradicts the testimonies of Hardy and Simon about the real purpose and nature of the event The invitation to the event, the event program, and the audiotape clearly reveal the extent of the Forum's efforts on behalf of Hardy and Hardy's participation at the event

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First, the invitation to the event makes it clear the event was not at all a candidate forum but rather an event specifically organized to promote Hardy's candidacy. Though Hardy, Everett, and Dr Simon testified that other candidates were present, neither the invitation nor the program describes the event as a "candidate night" or mentions other candidates being invited to attend and to speak. The invitation to the event clearly lists Timothy Hardy as the main speaker and states "We will plan strategy on how to get Tim Hardy elected." The printed program for the evening also lists a speech by Hardy identified as "Candidate for Republican Nomination to Third District Congressional Seat."

Second, the evidence contradicts Hardy's unequivocal testimony that he was specifically instructed that no speeches would be allowed and that he merely introduced his family but gave no speech. The evidence shows that Hardy actively participated in the event by making a speech and asking for support in getting elected. The invitation and program clearly list Hardy as a speaker and Hardy's speech is heard on the audiotape. Moreover, both Dr Simon and Everett testified that Hardy gave a prepared speech and Dr Simon stated that Hardy spoke on the issues during his presentation to the audience.

Third, the evidence contradicts Dr Simon's testimony that the phone banks were not exclusively focused on Hardy and Hardy's testimony that Dr Simon organized the volunteers for state and local races only. In fact, Dr Simon organized volunteers for the specific purpose of making phone calls and distributing literature promoting Hardy. Dr Simon testified that he specifically endorsed the pro-life candidate who was Hardy and that he distributed phone lists instructing the volunteers to make calls promoting Hardy's candidacy, though he also testified that they were also instructed to call on Forum issues. On the audiotape recording, however,

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Dr. Simon is heard discussing that the phone banks should focus solely on Hardy and that volunteers would receive subsequent mailings of the phone scripts for the Hardy calls. Though Dr. Simon testified that he was not sure whether Hardy was still at the event when he gave instructions on the phone banks and Hardy testified that he left before the event ended, the evidence shows that Hardy would have been present during Dr. Simon's instructions on the phone banks. Hardy testified that he heard Dr. Simon's remarks which followed the candidates' introduction and that he (Hardy) stayed for a while afterwards while the volunteers organized themselves by precinct. The same sequence of events is found on the audiotape, i.e., Dr. Simon's introduction of Hardy, followed by Hardy's speech, and immediately after Dr. Simon's organizing of volunteer for the phone banks. Thus, if Hardy was present for Dr. Simon's remarks, he had to have heard Dr. Simon's statements about getting him elected and the discussion about the phone banks.

Fourth, Hardy's testimony regarding his knowledge of Dr. Simon is inconsistent with the evidence. The evidence shows that Dr. Simon and Hardy knew each other and had interacted well before the "Swiss Hall" event, starting with Dr. Simon and the Forum's involvement in the recruitment of Hardy with Corley Everett, the meeting at Shoney's, Dr. Simon's early direct financial contributions to the Hardy campaign and Hardy's use of Dr. Simon's contribution to open his campaign account, Dr. Simon's steering of volunteers to Hardy's campaign and use of Corley Everett as the go-between for Dr. Simon and Hardy.

Even assuming that Hardy had not seen the Forum invitation to the event, was unaware of what the Forum was planning, and did not know beforehand who Dr. Simon or the Forum was, Hardy's active participation at an event where he asked for support and where his candidacy was

endorsed and volunteers organized to conduct phone banks and distribute literature promoting his candidacy would clearly constitute coordination between Hardy and the Forum and would taint any subsequent expenditures made by the Forum on behalf of Hardy AO 1988-22.

Following the "Swiss Hall" event, the Forum put out four different types of flyers promoting Hardy's candidacy. The first, a newspaper-styled flyer entitled "The Loyal Republican" and dated "May, 1994 primary edition," shows on the front page a photo of Stokes with Gloria Steinem and an article attacking Stokes' pro-choice stance and Steinem's support of the Stokes campaign. There is also a photo of Hardy and his family (provided by Hardy) and an article entitled "Conservative Candidate Hardy the 'Real' Republican." The Hardy article states that "Hardy is a pro-life Catholic conservative who stands to garner votes from Democrat conservatives in the November general election." The back of the tabloid shows a chart entitled "Who is the real Republican" and compares Hardy's position on issues of importance to the Forum i.e., abortion, NAFTA, gun control, Health Care, and gays in the military, with those of Clinton and Stokes. Under the chart are quotes from the candidates. Given the congruence of Hardy and the Forum's views on pro-life and other issues, the flyer can only be construed as expressly advocating the election of Hardy and the defeat of Stokes. Moreover, the Forum reported expenditures for this flyer in support of Hardy and against Stokes. The flyer does not contain a disclaimer stating whether or not it was authorized by any candidate or authorized candidate committee.

The Forum's second Hardy flyer entitled "Explanation of Ballot" explains the Forum's criteria for selecting which candidates to endorse. The back of the tabloid, entitled "Pro-Family Sample Ballot" for the May 24 primary, expressly advocates the election of Hardy and other

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clearly identified candidates by showing a completed ballot with an arrow by the name of Hardy and the names of other candidates endorsed by the Forum. The tabloid does not contain a disclaimer stating whether or not it was authorized by any candidate or authorized candidate committee.

The Forum's third Hardy flyer, in the form of a letter dated May 16, 1994, expressly advocates the election of Hardy and the defeat of Stokes by asking volunteers to contact the Forum to, among other things, make calls urging people to vote in the Republican primary to defeat Stokes and a handwritten note urging them to vote for Tim Hardy. The back of the tabloid contains the "Who's the Real Republican" chart comparing the views of Hardy, Stokes, and Clifton on various issues. This tabloid did not contain any disclaimer.

The Forum's fourth flyer is a reprint of a page from "The Letter," the Kentucky gay and lesbian newspaper, urging all gay and lesbian Republicans to vote for Stokes in the May 24 primary. In its 1994 October Quarterly Report, the Forum reported this flyer as an expenditure made in opposition to Stokes. This tabloid does not contain a disclaimer stating whether or not it was authorized by any candidate or authorized candidate committee.

Hardy testified that he found one of the flyers, possibly "The Loyal Republican," at his door and that he held a staff meeting to determine who had put it out. Hardy further testified that Everett told him that the Forum had put it out and that he (Hardy) was happy with the endorsement.

The Hardy Committee reports reflect that the Committee was low on funds in May 1994, right before the primary. It was during that time that Dr. Simon and the Forum put out tabloids endorsing Hardy as the Republican candidate in the Primary. This continued up until the very

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week of the primary The Primary was held on May 24, 1994. Susan Stokes narrowly defeated Hardy.

Through direct meetings between Dr Simon and Hardy and the involvement of Forum employee and volunteers, like Everett, as staff on the Hardy campaign, Dr Simon was informed of Hardy's campaign ideas and needs The initial meeting at the restaurant was a vehicle for Hardy to convey to Dr Simon his campaign plans, ideas, and needs Dr Simon's initial financial contribution to and steering of volunteers to the Hardy Committee helped to get the Committee off the ground The "Swiss Hall" event was specifically organized to plan strategy to get Hardy elected and Hardy actively participated in this by attending the meeting and asking for support Consequently, the Forum's expenses for the Swiss Hall event and for the tabloids promoting Hardy would have to be viewed as coordinated because they were planned in cooperation and/or at the request of the candidate Tim Hardy

In its 1994 July Quarterly Report, the Forum reported spending \$22,738 81 in total itemized "independent expenditures" for the Hardy flyers The expenditures were reported on the Schedule E and cover the period May 4, 1994, through June 9, 1994 The Schedule E was not signed by the treasurer and certified by a notary public attesting that the expenditures were not made in coordination with the candidate (the Forum subsequently filed an amended certified Schedule E) The Forum also reported spending \$778 (food and rental) for the Swiss Hall event Thus, the total amount in contributions to Hardy equal \$23,561 81

Finally, the position taken by Dr Simon during the investigation regarding the coordination allegations and certain other factors suggest that Dr Simon and the Forum knew that their expenditures in support of the Hardy campaign were not independent at the time they

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were made. These respondents initially claimed that the expenditures on behalf of the Hardy campaign were independent because there had been no contact with each other. Later, in their depositions, these respondents disclosed some information about contacts but minimized or mischaracterized the nature of these contacts. The investigation, however, revealed several instances of active collaboration and contradicted the respondents' testimony in various important respects, raising serious questions about these respondents' good faith belief that the expenditures were independent and suggesting that they attempted to obstruct the investigation by false testimony. Moreover, the Forum's failure to certify under penalty of perjury on Schedule E of its 1994 July Quarterly Report that its expenditures for the Hardy tabloids were not made "in cooperation, consultation or concert with, or at the request or suggestion of any candidate," and the lack of a proper disclaimer in the Forum tabloids support an inference that the violations were knowing and willful.

In light of all the foregoing, the General Counsel's Office is prepared to recommend that the Commission find probable cause to believe that the Freedom's Heritage Forum and Frank G Simon, M D , as treasurer, knowingly and willfully violated 2 U S C § 441a(a)(1)(A) by making \$22,516 81 in excessive contributions to the Hardy campaign, and knowingly and willfully violated 2 U S C § 434(b) by failing to disclose the making of \$23,516 81 in contributions to the Hardy campaign.

Shortly after the primary, Dr Simon employed Corley Everett, Hardy's former campaign manager. At about the same time, Ross, Hardy's former treasurer, volunteered to help Dr Simon prepare Forum reports. Ross also became Richard Lewis' campaign treasurer for the general election. After the primary, Lewis took over Hardy's campaign office space at Eline Realty.

**Richard Lewis**

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Richard Lewis knew Dr Simon and was familiar with the Forum's positions on the issues. In fact, the Forum had endorsed Lewis in his 1992 congressional race. In a letter to this Office, Lewis had admitted that, prior to becoming a candidate in the general election, he had spoken with Dr Simon, among others, "to determine their interest and opinions about [his] candidacy and chances." Lewis had also stated that "As the only pro life candidate in the general election, [he] felt [he] could count on the support of [the] Forum." In his deposition, Lewis testified that two to three weeks after the primary election, prior to his becoming a candidate, he met Dr Simon by chance and that he told Dr Simon he was considering running as an Independent in the general election and discussed some campaign issues. Lewis further testified that Dr Simon said he was in a hurry to get somewhere but was interested in further discussions with Lewis. Dr Simon confirmed in his deposition that he did meet Lewis by chance and that Lewis spoke of his plans to register as an Independent. Dr Simon's testimony, however, suggests that the encounter with Lewis took place before rather than after the primary because he said Lewis noted that he would register to run if Hardy lost.

Thus, this initial discussion between Lewis and Dr Simon conveyed to Simon that Lewis was committed to running and provided him with information about Lewis' views. At the same time, Dr Simon's expressed interest in discussing this further with Lewis conveyed to Lewis that Dr Simon was interested in the campaign.

The second meeting between Dr Simon and Lewis naturally followed from their previous discussion. Dr Simon testified that he and a small group made up of Ed Parker, Omer Chessner, and Corley Everett, among others, met in his medical office for a private evening meeting. Dr

Simon further testified that the purpose of the meeting was to select a candidate to run against Susan Stokes in the general election. According to Dr. Simon, Richard Lewis and Dennis Ormerod, the two contenders, each made a presentation in which they discussed their background, experience, campaign plans, and views on various issues, and also answered questions. Afterwards, Lewis and Ormerod left the room while the group debated who would make the better candidate and then voted to select Lewis as the candidate to support in the general election. Lewis and Ormerod returned to the room and were informed of the decision. The meeting was then adjourned.

In his deposition, Lewis maintained that he was uncomfortable that the meeting was held at Dr. Simon's office and that Simon was connected to the meeting. Lewis also maintained that afterwards he explained to the people who had attended the meeting what the campaign laws were and made it abundantly clear that there could be no "collaboration" or "relationship with Dr. Simon or anyone else." Both Chesser and Lewis tried to downplay Simon's presence at the meeting by testifying that all Simon did was "to furnish a place for a meeting" and that he "was not actually part of the meeting" though he stopped in briefly to pick up something. Dr. Simon, however, clearly testified that he was present throughout the meeting and took part in the selection of the candidate.

This meeting was essentially a recruiting session for the Forum and provided Dr. Simon with more information on Lewis' plans, projects, and needs and reinforced Simon's view of Lewis' commitment to run. This meeting also undoubtedly reinforced Lewis' view that he would have the Forum's endorsement and support in this race.

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Afterwards, Lewis circulated petitions and secured signatures from registered voters to have his name placed on the ballot in the general election. Dr. Simon may have assisted in this effort as well. Ed Parker and Omer Chesser accompanied Lewis when he went to file papers declaring his candidacy. Later, Lewis benefited by having several Forum volunteers on board including Bob Ross, his volunteer treasurer, Ed Parker, his campaign manager, Omer Chesser, and, Boyd Pendleton.

Lewis wanted a CPA as his treasurer, and Lewis explained that Hardy was instrumental in getting Ross, a CPA, to serve as volunteer treasurer for the Lewis campaign. Both Dr. Simon and Ross acknowledged that Ross was working as a volunteer accountant for the Forum (helping prepare Forum committee reports) while also working for the Lewis campaign.

Lewis acknowledged receiving a questionnaire from the Forum. Lewis testified that Ed Parker completed the questionnaire and returned it. The Forum as well as Dr. Simon endorsed the Lewis campaign.

Just as for Hardy, the Forum mounted and staged a similar event featuring Richard Lewis and also put out tabloids promoting Lewis. On September 27, 1994, several weeks from the general election, the Forum hosted an event at St. Luke's Church. Although the flyer announcing this event described it as a "Free Banquet" and mentioned other candidates, it nevertheless highlighted Lewis by, among other things, including a photo of Lewis, and stating the purpose for the event as "to hear debates by Richard Lewis and other leading candidates," and to obtain tabloids about Richard Lewis and other candidates for further distribution. The front of the flyer, entitled "Congressional Candidate Report" and dated "General Election Tuesday, November 8, 1994," contains a chart comparing Lewis' pro-life stance and stance on other issues with

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opposing views of Susan Stokes and Mike Ward, the other candidates in the general election. The flyer also contains a statement expressly advocating the election of Richard Lewis. "We have the Pro-Abortionists right where we want them, divided and fighting each other. Now Richard Lewis can win with only 40% of the vote." The back of the flyer contains information about another Forum event and a response slip for those wishing to attend the banquet or other Forum events, and to help distribute the Forum's "The Richard Lewis Tabloid" which, the flyer states, would be made available at the event. This flyer does not contain a disclaimer stating whether or not it was authorized by any candidate or authorized candidate committee.

Dr. Simon testified that he sent out invitations to this event to volunteers and to candidates but that the candidates' invitations were different in that the candidates' invitations would not have included Lewis' photo. A copy of an invitation dated September 14, 1994, that was sent to Susan Stokes, who did not attend, describes the event as a "banquet for precinct captains" and states that the invitee's opponent has also been invited and that each candidate will get 2 minutes to debate and one minute follow-up.

About 200-300 people attended the event, including members of the press, Lewis, as well as several other state or local candidates. Lewis was the only federal candidate who attended though Susan Stokes was invited and other federal candidates were probably also invited. Lewis and the other candidates brought their own campaign literature to distribute at the event.

Dr. Simon testified that he hosted the event which included a dinner, introduction of candidates by Simon, candidates' presentation, and distribution of tabloids. Dr. Simon explained that the Forum tabloids, including the tabloid promoting Lewis which had been described in the flyer announcing the event, were distributed at the end of evening, after the candidates spoke, and that

he encouraged people to pick up the tabloids for further distribution in their precincts Dr. Simon also testified that this was the first time the Lewis tabloid was made public and that Lewis was probably seeing it for the first time At the event, each candidate made a brief speech with Lewis speaking last Lewis said that he left right after his speech

This tabloid, entitled "Congressional Candidate Report," contains some of the same material found in the front page of the flyer announcing the event ( same title, same chart comparing the candidates' positions and photo of Lewis) The front of the tabloid features a photo of Lewis and three short pieces promoting Lewis' positions on various issues and comparing them with that of his opponents in the general election The front of the tabloid also contains a photo of Stokes with Gloria Steinem (used in the Forum's earlier "Loyal Republican" Hardy tabloid) and a photo of Ward (identified in the caption as giving a speech at a pro-abortion rally) The back of the tabloid contains a chart comparing the positions of Lewis, Ward, and Stokes, followed by quotes from each of these candidates, and a highlighted statement expressly advocating the election of Lewis which reads "Registered Democrats and Republicans can vote for Richard Lewis who actively opposes the liberal Clinton Agenda " This tabloid does not contain a disclaimer stating whether or not it was authorized by any candidate or authorized candidate committee

Lewis testified that he did not realize that the Forum was sponsoring the event until he arrived at the event Lewis also testified that he first saw the Lewis tabloids when he arrived at the event and that he was also present when Simon encouraged the attendees to distribute them Lewis, however, testified that he had no prior knowledge of and had nothing to do with either the Forum's announcement of the event or the Lewis tabloid Lewis further testified that had he

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known about these flyers before the event, he would have declined to attend. Finally, Lewis explained that he quickly realized that the tabloid would could cause problems and resolved to instruct his staff not to get involved in any distribution of Forum materials. Dr Simon testified that after the event and shortly before the general election on November 8, 1994, the Forum further distributed the "Congressional Candidate Report" tabloid by mail and door-to-door delivery

Lewis testified that sometime after the banquet, an individual came to his campaign headquarters waving one of the Forum's Lewis tabloids and exclaiming how she was going to support him Lewis testified that as soon as he became aware that the Forum tabloid he had seen at the St Luke's event was being further distributed, he called a meeting and informed his staff they could not distribute any Forum materials on behalf of his campaign and that his campaign could only put out materials prepared, printed and authorized by him

Dr Simon testified that the Forum also mailed out a "Pro-Family Sample Ballot" a week or two before the general election The front of the sample ballot expressly advocates the election of Lewis and other clearly identified candidates by showing an arrow by Lewis' name and the names of other candidates endorsed by the Forum, as well as notes for each endorsement The note for Lewis reads, among other things "Richard Lewis is the only Pro-Life/Pro-Family candidate in the race " The back of the ballot includes an "Explanation of Ballot" which sets out the Forum's criteria for selecting candidates, a solicitation for "pro-life/pro-family precinct captain" and a short note signed by Dr Simon The flyer does not contain a proper disclaimer stating whether or not it was authorized by any candidate or authorized candidate committee

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The Lewis campaign received relatively few contributions. Late in the campaign, it only received four \$1,000 contributions, two of which were personal contributions from the Simon family.

In the general election on November 8, 1994, Mike Ward won the election with 45% of the vote, Stoke garnered 43% of the vote and Lewis 12% of the vote. Ross resigned as Lewis' treasurer on November 2, 1994. After the general election, Ross became the paid accountant for the Forum, the American Family Association, and also personal CPA for Dr. Simon's medical practice and his family.

The evidence reveals that Dr. Simon and the Forum's involvement with the Lewis campaign exhibited some of the same features as the involvement with the Hardy campaign. Dr. Simon and the Forum had endorsed Lewis in an earlier congressional race, Dr. Simon was involved in the recruitment of Lewis and participated at a private meeting at which Lewis spoke about his campaign plans, needs, and issues, Dr. Simon and the Forum organized and hosted an event which prominently featured Lewis and in which Lewis participated, Dr. Simon/ Forum put out tabloids and sample ballots promoting Lewis, and, Dr. Simon made personal contributions to Lewis' campaign.

The information gathered by Dr. Simon through discussions with Richard Lewis helped convince Dr. Simon that the Forum could embark on this expenditure campaign with confidence that Lewis was committed to running while assuring Lewis that he could count on the Forum's support. These discussions tainted the independence of the Forum's expenditures on behalf of Lewis from the outset because they were based on the Forum's knowledge of Lewis' plans, projects, and needs provided by Lewis to Dr. Simon with an expectation of support. In addition,

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Lewis' attendance and participation at the Forum-sponsored event, where the Forum distributed tabloids promoting his candidacy, constituted coordination between Lewis and the Forum AO 1988-22.

The Forum disclosed on its 1994 October Quarterly Report only \$1,000 in independent expenditures made on behalf of the Lewis campaign. In its subsequent reports, the 12-Day Pre-General and 30-Day Post General Election Report, however, the Forum, instead of itemizing its expenditures as independent, as was previously done, disclosed \$818.50 and \$4,973.10 respectively in "Other Federal Operating Expenditures" made for the general election.

During the investigation, however, this Office discovered that the Forum had in fact made additional expenditures on behalf of the Lewis campaign. In his deposition, Dr. Simon admitted that the amounts noted as "Other Federal Operating Expenditures" (\$818.50 and \$4,973.10) were probably for mailing of tabloids promoting Lewis. The Forum has not filed an amended return for these amounts. In addition, this Office obtained copies of documentation showing that Dr. Simon paid the Publisher's Printing Company \$4,000 for the production of the "Congressional Candidate Report" tabloid. After the deposition, Bob Ross, for the Forum, filed an amended 12-Day Pre-General Report reporting the \$4,000 and an additional \$1,574.06 as disbursements for the general election. On August 15, 1996, however, Ross filed an amended Schedule E reflecting these amounts as independent expenditures made on behalf of the Lewis campaign. Dr. Simon explained that the checks for these two amounts were written on a temporary account and did not get turned in to the accountant.

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In its 1994 October Quarterly Report, the Forum disclosed a total of \$1,700 63 in disbursements for food for volunteers during September 1994 Dr Simon was asked about these expenses and testified that they were probably incurred for the candidate night

In sum, the Forum made contributions to Richard Lewis totaling \$14,066 29 (\$12,365 66 for the Lewis tabloids plus \$1,1700 63 for the event)

There is strong evidence that the Forum respondents knew that their expenditures on behalf of Richard Lewis were not independent at the time they were made On July 28, 1994, the Forum was notified of the complaint alleging coordination and reporting and disclaimer violations during the primary campaign Nevertheless, the Forum subsequently engaged in a similar pattern of coordinated expenditures to promote Lewis' candidacy and continued to put out tabloids without proper disclaimers Second, it appears that after having been notified of the complaint, the Forum tried to conceal additional expenditures on behalf of the Lewis campaign. The Forum disclosed on the 1994 October Quarterly Report only \$1,000 in expenditures made in support of the Lewis campaign Also, instead of itemizing its expenditures as independent, as it previously had done, the Forum began reporting its expenditures as "Other Federal Operating Expenditures" even though they were identified by the Forum as having been made for the purpose of the general election In fact, Dr Simon later testified that these other expenditures were probably made in support of the Lewis campaign Dr Simon and the Forum also failed to report an additional \$5,574 06 in expenditures made in support of the Lewis campaign Thus, Dr Simon and the Forum's continued practice of making coordinated expenditures and putting out tabloids without proper disclaimers after having been notified of the complaint and their later misreporting of the amount of expenditures made in support of the Lewis campaign show that

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Dr Simon and the Forum knew that their activities were unlawful and support an inference that the violations were knowing and willful

In light all of the foregoing, the General Counsel's Office is prepared to recommend that the Commission find probable cause to believe that the Freedom's Heritage Forum, Frank Simon, as treasurer, knowingly and willfully violated 2 U S C § 441a(a)(1)(A) by making \$13,066 29 in excessive contributions to the Lewis campaign, and knowingly and willfully violated 2 U S C § 434(b) by failing to disclose making \$14,066 29 in contributions

**B. ALTERNATIVE REPORTING VIOLATION**

Even if it were possible to accept the Forum's argument that their expenditures were independent, the Forum respondents, by their own admission, violated several provisions of the Act. The Forum respondents admitted to having failed to certify on Schedule E of the 1994 July Quarterly Report that the expenditures were not made "in cooperation, consultation or concert with, or at the request or suggestion of any candidate or any authorized committee or agent thereof." The Forum respondents further admitted to having failed to file 24-hour reports for these expenditures. Thus, even if the expenditures were deemed to be independent, the General Counsel will recommend that the Commission find probable cause to believe that the Forum and Dr Simon as treasurer violated 2 U S C § 434(c)

**C. DISCLAIMER VIOLATIONS**

**1. Applicable Law**

The Act provides that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, direct mailing, or other type of general public political advertising, such communication shall contain a disclaimer in

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accordance with 2 U S C § 441d(a), see also 11 C F R § 110 11(a)(1) "Expressly advocating" means that the communication includes a message that calls for the election or defeat of a clearly identified candidate. Examples of phrases that indicate express advocacy include "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against," "defeat," "reject" or "communications" which in context can have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. 11 C F R § 100.22. For such a communication, the disclaimer must explicitly state both who paid for it and whether or not it was authorized by any candidate or campaign committee. 2 U S C §§ 441d(a)(1)-(3) and 11 C F.R. § 110 11(a)(1).

## **2. Analysis**

The flyers the Forum prepared and distributed expressly advocated the election of Hardy and Lewis, (see discussion of flyers, *supra*). Most of the flyers contained the standard statement "Paid for by Freedom's Heritage Forum, Art Cermignara, Treasurer, P O Box 6689, Louisville, KY 40206." This statement, however, does not indicate whether the tabloids were authorized or not authorized by the candidate or the candidate's committee, as required by Section 441d(a). One of the flyers did not appear to contain any statement indicating who paid for it.

Moreover, in light of the earlier discussion regarding the knowing and willful nature of Dr. Simon and the Forum's violations with regard to the coordination issue, it appears that the Forum tabloids did not contain proper disclaimers because the Forum did not wish to admit that it had coordinated its expenditures with the Hardy and Lewis committees supporting an inference that the violations were knowing and willful.

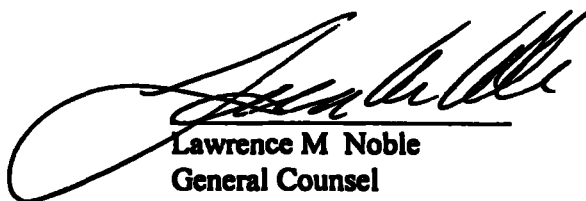
In light of the foregoing, the Office of General Counsel is prepared to recommend that the Commission find probable cause to believe that the Freedom's Heritage Forum and Frank G Simon, M D , as treasurer, knowingly and willfully violated 2 U S C. § 441d(a)

### III. RECOMMENDATIONS

1. Find probable cause to believe that the Freedom's Heritage Forum and Frank G Simon, M D , as treasurer, knowingly and willfully violated 2 U S C §§ 441a(a)(1)(A), 434(b) and 441d(a)

2 Find probable cause to believe that the Freedom's Heritage Forum and Frank G Simon, M D , as treasurer, violated 2 U S C § 434(c)

10/2/97  
Date

  
Lawrence M Noble  
General Counsel

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